Tentative Rulings for January 23, 2018
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

12CECG04013 ***Babcock v. Centex Homes*** **(Dept. 501)**

14CECG00069 ***Sailors v. City of Fresno*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

16CECG01934 ***Magdaleno v. Adventist Health System*** **is continued to Tuesday, February 6, 2018 at 3:30 p.m. in Dept. 501.**

16CECG02919 ***The Travelers Indemnity Company of Connecticut v. Airport Specialty Products*** **is continued to Wednesday, February 21, 2018 at 3:30 p.m. in Dept. 503.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

Tentative Rulings for Department 403

(24) **Tentative Ruling**

Re: ***Kahn v. Deutsche Bank National Trust Company***
Court Case No. 16CECG01242

Hearing Date: **January 23, 2018 (Dept. 403)**

Motion: 1) Cross-Defendant Judy Frank's Motion for Judgment on the Pleadings Against the Cross-Complaint of Deutsche Bank National Trust Company
2) Defendant/Cross-Defendant Judy Frank's Motion to Bifurcate

Tentative Ruling:

To deny both motions. Cross-Defendant Judy Frank is granted 10 days' leave to file her answer to the cross-complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

Motion for Judgment on the Pleadings:

- *Restitution to Prevent Unjust Enrichment*

Ms. Frank relies on only one case, *Morrison v. Land* (1915) 169 Cal. 580, to support her argument that Deutsche Bank cannot allege a claim for "restitution to prevent unjust enrichment" unless it can allege it has no adequate remedy at law. However, that case does not support that conclusion; the Supreme Court in that case was not dealing with a claim for restitution to prevent unjust enrichment, but with plaintiff's claim for specific performance of a contract, and the court simply found that *in such an action* where the remedy at law (breach of contract) was sufficient, the equitable cause of action for specific performance was unavailable. (*Id.* at p. 589.) This is because it has been long established that the allegation of "inadequacy of the remedy at law" is an element of an action for specific performance. (*Id.* at p. 588-589—"Over and over again…this court has said that inadequacy of any remedy at law is absolutely essential *to the granting of a decree of specific performance*" (emphasis added). See also Witkin, Cal. Proc. 5th (2008) Plead, § 785: Elements of claim for specific performance are: 1) a specifically enforceable contract which is sufficiently certain in its terms; 2) adequate consideration, and a just and reasonable contract; 3) plaintiff's performance, tender, or excuse from nonperformance; 4) the defendant's breach; and 5) *the inadequacy of the remedy at law*.)

"An extract from an opinion must be read in the light of the subject there under discussion and with reference to the facts in that case, and rules applicable to the decision in which they appear cannot be repeated in exemplification of a theory different from that to which they were applied in the case wherein the opinion was rendered." (*Southern Cal. Enterprises v. D.N. & E. Walter & Co.* (1947) 78 Cal.App.2d 750,

757; *People v. Gilbert* (1969) 1 Cal.3d 475, 482--"It is axiomatic that cases are not authority for propositions not considered." See also *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, *fn* 2—"Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.")

Thus, moving party did not carry its burden of showing that Deutsche Bank's cause of action for restitution to prevent unjust enrichment is not adequately stated. Moreover, opposing parties cited to cases where, on facts similar to the case at bench (albeit involving deeds of trust which had been mistakenly reconveyed, rather than deeds of trust with faulty property descriptions), courts have allowed the pleader to maintain causes of action for both restitution <u>and</u> common counts for money had and received. (See, *e.g., First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657 and *F.D.I.C. v. Dintino* (2008) 167 Cal.App.4th 333, 340.) The motion as to this cause of action must be denied.

- *Common Count for Money Had and Received*

It appears Ms. Frank premises her argument on what the understanding of the escrow agent was in disbursing the proceeds of sale to her, which is why she places emphasis on the fact that there was no demand for a payoff of the indebtedness prior to her receipt of the money. However, it is not clear why the intention or understanding of the escrow holder is the critical factor, or a factor at all. Cross-Complainant is not alleging that the *escrow holder* made a mistake in paying the funds to Ms. Frank, but that *Ms. Frank*, knowing the prior claim cross-complainant had on the proceeds of sale (based on her own act of promising to pay that debt and allowing the subject property to serve as collateral), caused the mistaken transfer to herself by not *herself* directing payoff of the indebtedness. As Ms. Frank points out, a "key element" of this common count is that the money she received was *intended to be used* for cross-complainant's benefit. (*Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454.) And the facts as alleged adequately establish (and it is taken as true on this motion) that from the inception of the loan to her and her granting of a security interest in her real property, <u>she</u> knew that any proceeds of sale she ever received from the sale of the security was *intended to be used* to pay the indebtedness as a first priority. This cause of action is adequately stated, so the motion must be denied.

<u>Motion to Bifurcate</u>:

Bifurcating into completely separate trials as proposed on this motion would involve significantly more waste of time for the court, the parties, and witnesses than hearing all matters together, inasmuch as much of the evidence would need to be presented twice instead of just once. The title claims and the loan claims are factually related and bifurcation would require significant duplication of testimony and evidence. Furthermore, it does not appear that proving up payments and non-payments on the Note will involve the court reviewing volumes of documents or getting involved in onerous calculation of interest accruals. The compilation and calculation of such evidence is a routine matter for a lender such as Deutsche Bank to assemble, as well as for forensic accounting experts to analyze, prepare reports for, and testify concerning. Ms. Frank failed to establish that bifurcation is warranted. At best, the

factors she points to may suggest that some causes of action should be tried after others, but the trial judge can determine this easily enough. The motion must be denied.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 01/22/18
(Judge's initials) (Date)

Tentative Rulings for Department 501

Tentative Rulings for Department 502

Tentative Rulings for Department 503

03

Tentative Ruling

Re: ***Hobensack v. Akers***
Case No. 16 CE CG 01709

Hearing Date: January 23rd, 2018 (Dept. 503)

Motion: Defendant O'Bara's Motion for Summary Judgment, or in the Alternative Summary Adjudication

Tentative Ruling:

To deny defendant O'Bara's motion for summary judgment, or in the alternative summary adjudication. (Code Civ. Proc. § 437c.)

Explanation:

First, defendant moves for summary adjudication of the professional negligence and wrongful death causes of action on the ground that his care of decedent did not fall below the standard of care for physical therapists. Defendant presents the declaration of his expert, Stephanie Kaplan, P.T., D.P.T., A.T.P., who states that the physical therapy provided by defendant to the decedent was reasonable, appropriate, and within the standard of care for licensed physical therapists in California. (Kaplan decl., ¶ 9.) "Decedent had not fallen during any prior physical therapy and had successfully performed the gait training exercise that he was performing when he lost his balance and fell on March 27, 2015. Also prior to March 27, 2015, Decedent demonstrated to O'Bara the ability to easily self-correct, pause, and start over without falling when he misstepped or lost his balance (which occurred only occasionally). The standard of care did not require O'Bara to have Decedent engage in gait training or walking exercises with assistance by O'Bara or some other outside stabilizer such as a walker, cane, or parallel bars." (*Ibid*.)

Thus, defendant has met his burden of showing that he did not breach the standard of care when he provided physical therapy to decedent, and the burden then shifts to plaintiff to present her own expert testimony raising a triable issue of material fact as to whether defendant breached the standard of care. (*Landeros v. Flood* (1976) 17 Cal.3d 399, 410; *Munro v. Regents of the University of California* (1989) 215 Cal.App.3d 977, 983-984.)

Here, plaintiff has submitted the declaration of her own expert in physical therapy, Theresa Stofan, RPT, who states that, "After reviewing these records, and based on my education and experience, it is my opinion, to a reasonable degree of medical certainty and/or probability that Mr. O'Bara did not meet the standard of care for physical therapists in the following ways:

(a) Failed to properly document the treatment, progress and objective measurements of the patient;

(b) Failed to assess Mr. Hobensack for whether or not he was a fail risk;

(c) Failed to determine that Mr. Hobensack was a fall risk;

(d) Failed to utilize supportive aids since Mr. Hobensack was a fall risk;

(e) Failed to utilize supportive aids because Mr. Hobesack's response time and mobility were impaired;

(f) Failed to provide direct aid to help prevent a fall, since he was 20 feet away from him during the walking exercises." (Stofan decl., ¶ 4.)

In addition, Stofan states that, "Based on my review of the materials Mr. O'Bara retained and had available to him at the time he began treating Mr. Hobensack, it is my opinion he should have assessed him for the risk of falling. Had he done so, using the method of assessment Mr. O'Bara claims to use, either Tinetti Balance Assessment tool or Berg Balance scale, and based on Mr. O'Bara's intake report, it is my opinion that Mr. Hobensack would have easily scored as a high risk under either the Tinetti or Berg methods. If Mr. O'Bara had properly assessed Mr. Hobensack and identified him as a fall risk, he should have then utilized some supportive aids at an times and/or been within close proximity so as to be able to manually assist Mr. Hobensack in his exercises. In addition, Mr. O'Bara stated that he was aware that Mr. Hobensack's response time and mobility were impaired. This is an independent reason for requiring that Mr. Hobensack utilize supportive aids during all exercises." (Stofan decl., ¶ 5.)

Thus, plaintiff has presented sufficient evidence to raise a triable issue of material fact with regard to the issue of whether defendant breached the standard of care for physical therapists, and as a result the court will not grant summary adjudication based on the lack of evidence showing a breach of the standard of care.

However, defendant also moves for summary adjudication on the alternative ground that the undisputed facts show that the fall at the physical therapy facility did not cause decedent's death.

"To determine that '"a negligent actor [is] liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm." "Legal cause" exists if the actor's conduct is a "substantial factor" in bringing about the harm and there is no rule of law relieving the actor from liability.'" (*Anaya v. Superior Court* (2000) 78 Cal.App.4th 971, 973–974, internal citations omitted.)

In addition, "It has long been the rule that a tortfeasor responsible for the original accident is also liable for injuries or death occurring during the course of medical treatment to treat injuries suffered in that accident." (*Id*. at p. 974.)

"It is settled that where one who has suffered personal injuries by reason of the tortious act of another exercises due care in securing the services of a doctor and his injuries are aggravated by the negligence of such doctor, the law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment and holds him liable therefor." (*Ash v. Mortensen* (1944) 24 Cal.2d 654, 657, internal citations omitted.)

Furthermore, "such liability is not limited to negligently caused additional harm or that caused by malpractice. The applicable rule is stated in section 457, Restatement Second of the Law of Torts: 'If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.'" (*Hastie v. Handeland* (1969) 274 Cal.App.2d 599, 604–605, internal citations omitted.)

"The question is one of causation, and where the additional harm results either from the negligence of doctors or hospitals who furnish necessary medical care, or from the materialization of a risk inherent to necessary medical care, the chain of causation set in motion by the original tort remains unbroken." (*Id*. at p. 606, internal citation omitted.)

"In those cases the defendant's careless driving exposed the plaintiff to a risk of physical harm. Medical treatment for the resulting injuries is a kind of physical harm for which the defendant is liable whether or not the treatment is itself negligent. The important factor in those cases is that the medical treatment is closely and reasonably associated with the immediate consequences of the defendant's act and forms a normal part of its aftermath." (*Munoz v. Davis* (1983) 141 Cal.App.3d 420, 426–427, internal citations omitted.)

In such cases, "the original tortfeasor is always considered to be a proximate cause of the plaintiff's further injuries." (*Blecker v. Wolbart* (1985) 167 Cal.App.3d 1195, 1203.)

Here, defendant has presented the declaration of his expert in neurosurgery, Dr. Atul Patel, in order to demonstrate that decedent's surgery and subsequent death were not caused by the fall at the physical therapy facility. Dr. Patel summarizes decedent's lengthy history of medical problems, which included probable strokes, falling, diabetes, osteoarthritis, kidney disease, and degenerative back disease. (Patel decl., ¶ 8.) He then concludes that, "Based on my education, training, and experience as a licensed Physician and Neurosurgeon, as well as my review of the relevant records and materials identified herein, it is my professional opinion, to a reasonable degree of medical probability, that the physical therapy provided to Decedent by O'Bara in February 2015 and March 2015, and Decedent's fall on March 27, 2015, were not substantial factors in causing Decedent's death." (*Id*. at ¶ 9.)

"The decline in Decedent's neurological function had begun long before the fall at physical therapy, and any subsequent decline after the fall at physical therapy, to a reasonable degree of medical probability, resulted from the natural course and

progression of his health status, diseases and conditions that preexisted his fall on March 27, 2015." (*Ibid*.)

"Based on the pre-existing spondylolisthesis and Decedent's other health and medical issues, illnesses, and conditions, Decedent would have more likely than not required the Lumbar Surgery that Dr. Levy performed in January 2016 regardless of whether he fell on March 27, 2015. It cannot be said to a reasonable degree of medical probability that the fall at physical therapy on March 27, 2015 was a substantial factor in causing any significant decline in Decedent's health or neurologic function, or in necessitating the Lumbar Surgery." (*Ibid*.)

"Decedent died approximately 10 months alter the fall at physical therapy, 21 days post-Lumbar Surgery, with the causes of death noted to be septic shock and hypertension. The etiology of the septic shock is uncertain. However, the fall on March 27, 2016, was not, to a reasonable degree of medical probability, a substantial factor in causing Decedent's septic shock, hypertension or death." (*Ibid*.)

However, Dr. Patel's declaration is not sufficient to meet defendant's burden of showing that the fall at defendant's physical therapy facility was not a contributing cause of decedent's death. As discussed above, a defendant who negligently causes an injury to the plaintiff may be held liable for subsequent injuries or death that the plaintiff suffers during attempts to treat the negligently caused injuries, as long as the medical treatment is a reasonably foreseeable consequence of the original injury. (*Hastie v. Handeland*, *supra*, 274 Cal.App.2d at pp. 604–606.) "The important factor in those cases is that the medical treatment is closely and reasonably associated with the immediate consequences of the defendant's act and forms a normal part of its aftermath." (*Munoz v. Davis*, *supra*, 141 Cal.App.3d at pp. 426–427, internal citations omitted.)

Here, defendant does not deny that plaintiff was injured as a result of the fall at his facility. His expert only claims that plaintiff's eventual back surgery and subsequent death were not caused by the fall, but instead by other medical conditions that preexisted the fall. However, a reasonable jury could conclude that it is reasonably foreseeable that a patient who suffers a fall while undergoing physical therapy may require further medical treatment as a result of the fall, including surgery for back injuries. While the decedent's other medical conditions and the long delay between the fall and the surgery may weigh against a finding that the fall caused the need for surgery and the decedent's ultimate death, this is an issue of fact that needs to be resolved by a jury and not by the court as a matter of law on summary judgment.

Defendant's expert's opinion that there was no causal link between the fall and the surgery and subsequent death is an improper legal conclusion as to a matter of ultimate fact, not the kind of issue on which an expert can properly opine. "Courts must be cautious where an expert offers legal conclusions as to ultimate facts in the guise of an expert opinion." (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 865.) Plaintiff has objected to the declaration of Patel on the ground that it offers improper legal conclusions, among other objections, and the court intends to sustain the objections. (See plaintiff's objections 1, 2, 3, 4, 5.)

In the present case, the question of whether the surgery and death were at least partially caused by decedent's fall at defendant's facility is an issue of fact that must be resolved by a jury, as it relates to the question of whether the surgery was a foreseeable consequence of the fall, not a question that can be properly determined by expert testimony. Therefore, the court intends to find that defendant has not met his burden of showing that the fall was not a cause of decedent's death, and the court will thus deny the motion for summary judgment.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 01/19/18
(Judge's Initials) (Date)

(24) **Tentative Ruling**

Re: ***Keene v. Lithia Jef, Inc.***
Court Case No. 16CECG00590

Hearing Date: **January 23, 2018 (Dept. 503)**

Motion: Plaintiff's Motion to for Attorney Fees and Costs

Tentative Ruling:

To grant attorney fees in the amount of $63,906.75, and to fix costs in the amount of $5,196.91. (Code Civ. Proc. §§ 1032, 1033.5; Civ. Code §§ 1717, 1780, 2983.) In the event a hearing is needed, the court will consider increasing the amount awarded to include moving party's costs/fees for appearance.

Explanation:

Plaintiffs' lawsuit included claims for violation of the Consumer Legal Remedies Act ("CLRA"), Civil Code section 1750, *et seq*., the Automobile Sales Finance Act ("ASFA"), Civil Code section 2980, *et seq.,* and breach of contract. Each of these claims permitted plaintiffs to obtain attorney fees and costs if they prevailed. (Civ. Code §§ 1717, 1780, subd. (e), 2983.)

Neither the CLRA nor ASFA define prevailing party. Civil Code § 1717 does, and states it is "the party who recovered greater relief in the action the contract." (*Id.*, subd. (b)(1).) Cases define prevailing party under two different concepts. One line of cases look for the party obtaining the net monetary recovery. (*Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1158, *disapproved on other grounds by Snukal v. Flightways Mfg., Inc*. (2000) 23 Cal.4th 754 and *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246.) The second line of cases discuss the issue in terms of the party who succeeds in obtaining his litigation objectives. (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1048.) Generally, a plaintiff may be considered a prevailing party if they "succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing suit." (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153, *quoting Hensley v. Eckerhart* (1983) 461 U.S. 424, 433, but with emphasis added by appellate court.)

Here, plaintiffs achieved their litigation objectives via the mediation settlement, inasmuch as defendant agreed to pay them $15,000 in damages and to pay off the deficiency, and to pay their attorneys' fees and costs. In agreeing to the latter, it appears defendants conceded that plaintiffs were the prevailing parties.

However, the court will reduce the number of hours sought by plaintiffs' counsel. In ruling on a request for attorney's fees, the trial court should first determine the number of hours reasonably spent by the attorneys, and the reasonable hourly rate of the attorneys, i.e. the "lodestar." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133.) The court should then consider whether to apply a multiplier to the lodestar amount, taking into account (1) the novelty and difficulty of the questions involved;

(2) the skill displayed in presenting them; (3) the extent to which the nature of the litigation precluded other employment by the attorneys; and (4) the contingent nature of the fee award. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Ketchum, supra*, at p. 1132.)

In vehicle sale fraud cases, the lodestar may well exceed the recovery by the client, as often small sums are involved for damages, but the cases can take "substantial expenditure of time and effort . . ." (*Graciano v. Robinson Ford Sales, Inc*. (2006) 144 Cal. App. 4th 140, 164.) A lodestar multiplier may also be appropriate after considering the risk of non-payment and the importance of the result to the prevailing parties. (*City of Oakland v. Oakland Raiders* (1988) 203 Cal. App. 3d 78, 82-84.)

- *Lodestar: Hourly Rates*

Here, counsel has presented evidence that he and other attorneys at the firm incurred 113.2 hours billed at rates of between $310 and 620 per hour. (Babbitt decl, ¶ 3, and Exhibit 1 thereto.) Defendants challenge these rates as greater than the prevailing rates in this County. However, the court finds them reasonable. The bulk (85%) of the work was done by Mr. Babbitt, who charges $495 per hour. Mr. Babbitt has practiced for many years, with over 16 years in the private sector in the field of consumer advocacy, so he is highly experienced. The court is aware of at least one seasoned attorney in this County who practices consumer "lemon law" and whose hourly rate of $425 per hour has been approved by this court. Therefore, Mr. Babbitt's "out-of-town rate" is within the ballpark of reasonableness for this area. Ms. Escalante, who charges $310 per hour, did most of the rest of the work. She has only been practicing since 2013, so she is far less experienced and there is no indication that she has any trial or litigation experience. Even so, $310 per hour is not an unreasonable rate, even in the Fresno area.

Plaintiffs' counsel are out-of-town attorneys, and where a party is seeking out-of-town rates he/she is required to make a "sufficient showing…that hiring local counsel was impractical. (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1244. Plaintiff Alsup's declaration states that she spoke to a male at the law firm of Kemnitzer Barron & Krieg (a Fresno firm) and was told that it was not taking cases against Lithia dealerships, and she was expressly told to contact the firm of Rosner, Barry & Babbitt. "A plaintiff's threshold showing of impracticability, however, is not onerous…." (*Center For Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 618, *citing to Horsford v. Board Of Trustees Of California State University* (2005) 132 Cal.App.4th 359, 399.) Here, plaintiffs met that showing, and defendants failed to rebut plaintiffs' contention that it was necessary to hire out-of-town counsel.

The court concludes that the hourly rates are reasonable.

- *Lodestar: Specific Fee Entries*

Defendants also challenged several of the specific items on the billing record attached to Mr. Babbitt's declaration. However, the court did not find that any of the items appeared to be charging for services that were secretarial or paralegal in nature, or that they used dubious billing methods. The one charge by Mr. Rosner (the only charge at $620 per hour) was reasonable, as it is the firm's policy to have him, as founding partner, send an initial letter to clients to assure them their case will be well handled.

Also, the court will not disallow the time charged for the initial ex parte hearing, even though it was denied, since that was based only on a technicality and the second ex parte application was granted; plaintiff provided evidence that the initial ex parte provided them with information helpful toward that end. (*Cabrales v. County of Los Angeles* (9th Cir. 1991) 935 F.2d 1050, 1053—"The rationale [for allowing the attorney fees] is clear: If a plaintiff ultimately wins on a particular claim, she is entitled to all attorney's fees reasonably expended in pursuing that claim-even though she may have suffered some adverse rulings [where the adverse ruling] was simply a temporary setback on the way to a complete victory for plaintiff" (brackets added).) Even so, the court will reduce the time allowed for preparation of the first ex parte application by 1.1 hours, and also will allow only 1.1 hours for preparation of the second ex parte, for a total reduction of 2.2 hours at $495 per hour.

The court will disallow the time included for the first motion to compel: the sanction amount already awarded on that motion was to compensate counsel for the time spent on that motion, so these charges cannot be compensated again. The sanction order is enforceable in the same way as a money judgment. (Code Civ. Proc. §§ 680.230, 680.270, 699.510.) This time is reflected in charges for this motion (all at $495/hour) were on 6/23/17 (2.50), 6/26/17 (3.30), 6/28/17 (2.20), 7/25/17 (.20), 7/27/17 (.40), 7/31/17 (8.20), 8/1/17 (.30), 8/7/17 (.20), and 8/18/17 (.10). Thus, a total of 17.4 hours at $495/hour will be deducted from the fees awarded on this motion.

The court will allow for time spent on the two discovery motions which ultimately were not heard due to the settlement, since it appears these motions were made necessary due to defendants' actions and filing them kept the pressure on defendants to settle at mediation. In short, they appear to have been helpful to the resolution of the case. Even so, the court will reduce the time allowed from what is requested. The billing records reflect 7.10 hours at $495/hour (on 8/3/17) for drafting the motion to compel deposition, but the moving papers themselves claimed 6.5 hours for this task. Furthermore, the court finds it reasonable to allow only 4 hours for drafting this motion, representing a reduction of 3.4 hours at $495/hour. Similarly, on the motion to compel compliance, the time record shows an entry for 4.3 hours on 8/4/17 for drafting the motion, and yet in the moving papers counsel claimed he spent 3.5 hours drafting it. The court will allow 3.5 hours for this motion, representing a reduction of .8 hours at $495/hour.

Defendants also ask that counsel's time spent in drafting a first amended complaint not be compensated, since it was excessive at 2.10 hours, and it was never filed. However, the charge, on 7/19/17, was not just to draft the amended complaint

but also to prepare a stipulation to its filing and an email regarding it to opposing counsel. The charge at 2.10 hours appears reasonable for all services rendered, and the court cannot determine that this was not helpful to resolution of the case at mediation, since (as with the discovery motions) continuing in the litigation mode arguably kept the pressure on defendant to settle at mediation. This time is allowed in full.

Defendants also object to vague entries as to communications with the clients. However, the time records need not go into detail about what was discussed with the clients. There is no evidence that these communications did *not* occur. They will be allowed. Similarly, objections to inter-office conferences will be allowed: the mere fact that only one timekeeper recorded such a conference is not an indication that the conference did not occur, but rather that the attorneys were attempting to keep costs to a reasonable level rather than to "double-bill" for such conferences. Defendants' objections to "block billing" are not well taken, as the supposed instances where this occurs are sufficiently detailed to show what services were performed. There is no *per se* prohibition against "block billing," and furthermore the entries are not impermissibly vague. (See, *e.g., Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1325—Records showed at least 20 entries merely stating "further handling," which the trial court concluded had "obscured the nature of some of the work claimed," and had damaged counsel's credibility.)

- *Additional Fees Incurred on this Motion*

The moving brief sufficiently informed defendants that in addition to the fees incurred as of the filing of the motion, plaintiffs asked for fees incurred in defending the motion. (Opening memo, p. 12:19-24.) Along with the Reply brief, Mr. Babbitt provided an additional declaration indicating he had billed an additional 7.7 hours for reviewing the Opposition and researching and drafting the reply, and he asked for this time to be included in the fee award.

An attorney is entitled to compensation for the time expending in litigating the fee award ("fees on fees"). (*Ketchum v. Moses, supra,* 24 Cal.4th at p. 1141; *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 997.) However, in *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, the California Supreme Court held that the issue of whether the multiplier should be applied to the "fees on fees" portion should be left to the court's discretion (*Id.* at pp 581-583—Noting it might be appropriate when the opposition to the fee motion "creates extraordinary difficulties.")

The court will allow plaintiff the additional fees for time spent litigating the fee issue. However, defendant's opposition was not complicated, nor did it cause "extraordinary difficulties," so the multiplier will not be applied to that portion of the fee. Therefore, the additional fees incurred in litigating the fee issue totals $3,811.50.

- *Adjustments to Lodestar*

Plaintiffs seek attorney fees based on a lodestar they calculated as being $51,844.50, based on 113.20 attorney hours at a "blended hourly rate" of $457.99 per

hour for the four timekeepers (i.e., rather than using each timekeeper's actual hourly rate). Pursuant to the findings made above, the court will reduce this figure by 23.8 hours at $495/hour, or $11,781. Thus, the initial unadorned lodestar is a total of $40,063.50 ($51,844.50 minus 11,781) plus the additional "fees on fees" allowed in the amount of $3,811.50.

- *Multiplier*

Next, the court finds that a multiplier is proper here at the 1.5 rate sought by plaintiffs. (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287-288—Risk factor alone can justify multiplier; *Ketchum v. Moses, supra,* 24 Cal.4th at pp. 1133-1134.) While the claims involved in the case were not exactly novel, they were somewhat complex and difficult, since they involved the Consumer Legal Remedies Act and the Automobile Sales Finance Act, and included claims of fraud. The attorneys were skilled and experienced in litigating the case, and the time they spent on the case prevented them from spending time on other cases. The attorneys also worked on a contingent fee basis, taking on all the financial risk and fronting all costs. The results of the litigation were successful from the plaintiffs' point of view, since they were paid $15,000 in damages, the deficiency was paid off, and defendants agreed to pay their attorneys' fees and costs. Plaintiffs' attorneys conducted significant discovery, including some depositions, and while the motion practice in the case was not overly extensive, plaintiffs were required to file several discovery motions due to defendants' actions. A multiplier of 1.5 is appropriate and reasonable under the circumstances.

Thus, the lodestar of $40,063.50 will be increased by $20,031.75, for an enhanced lodestar of $60,095.25, plus the additional fees incurred in litigating the fee issue of $3,811.50 (with no multiplier being applied), for a total fee of $63,906.75.

- *Costs*

Plaintiffs claim costs of $5,349.73.

Items of allowable costs are set forth in Code of Civil Procedure section 1033.5, subdivision (a), and disallowed costs are set forth in subdivision (b). Items not expressly mentioned in the statute "upon application may be allowed or denied in the court's discretion." (Code Civ. Proc. § 1033.5, subd. (c)(4).) All allowed costs must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation, and they must be reasonable in amount and actually incurred. (Code Civ. Proc. § 1033.5, subd. (c)(1), (2) and (3).)

The court will allow the fees paid to the electronic filing service providers, as this is expressly allowed by statute. (Code Civ. Proc. § 1033.5, subd. (a)(14). The court will also allow the fees for CourtCall, as this is not a cost that is disallowed by statute, and such a cost is reasonably necessary to the conduct of the litigation, and moreover is more economical to all concerned. However, the costs for overnight mail are expressly disallowed by statute, as this is regarded as a postage cost. (*Id.*, subd. (b)(3); *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1627-1628—Federal Express charges disallowed.) The court has identified items designated as either "overnight" or "FedEx" dated 2/29/16 ($13.90), 6/15/16 ($20.57), 12/29/16 ($13.96), 12/30/16 ($13.96), 8/7/17

($24.86), and 8/1/17 ($32.98), so the total amount to be deducted in this category is $120.23.

As for the travel costs related to depositions, these are expressly allowed by statute. (Code Civ. Proc. § 1033.5, subd. (a)(3)(C).) The court will allow the full amount of the airfare claimed, as defendant did not establish that the cost incurred was inordinate. Even the fee for the non-refundable airfare for the deposition that ended up not going forward is allowed, as the cost *was* incurred, and only reason the deposition did not occur was because of defendant's failure to cooperate in the discovery process, as this court found on the motion to compel. Allowable travel costs include costs for hotels, car rentals, gas and parking. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 59.) However, it does not include the cost of meals, since the statute does not mention meals eaten while attending depositions. Meals cannot be justified as "necessary to the conduct of the litigation," since the attorneys and parties have to eat, whether at a deposition or not. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774-775.) Thus, the meal costs totaling $32.59 are not allowed.

Therefore, of the total costs requested of $5,349.73, the total amount deducted is $152.82, and therefore the amount of costs which will be awarded is $5,196.91.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 01/19/18
(Judge's Initials) (Date)

(17) **Tentative Ruling**

Re: ***Gold v. Berbey, et al.***
Court Case No. 16 CECG 02260

Hearing Date: January 23, 2018 (Dept. 503)

Motion: Defendants' Motion to Reconsider Plaintiff's Motion to Compel Depositions of Defendants Monalisa Berbey and Bryan Scott Schoonover with Production of Documents (and Request for Sanctions)

Tentative Ruling:

To deny defendants' motion. To grant Court's own motion to reconsider sanctions and to modify order of November 28, 2018 such that sanctions are not payable by Robert F. Kull of Kull + Hall, but only by deponents Monalisa Berbey and Bryan Scott Schoonover.

Explanation:

Defendants Have not Established a Basis for Reconsideration

Code of Civil Procedure section 1008 provides that "[w]hen an application for an order has been made to a judge, or to a court, and … granted ... any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order." "The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (*Ibid*.)

The procedural requisites contained in section 1008 "for reconsideration of orders and renewal of motions previously denied are jurisdictional as applied to the actions of parties to civil litigation." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1103-1104.) By contrast, because trial courts have the inherent power to reconsider and correct their own interim decisions in order to achieve substantial justice, section 1008 does not limit a court's ability to reconsider its interim orders on its own motion. (*Id.* at p. 1107.)

A party seeking reconsideration must provide a satisfactory explanation for the failure to produce the evidence or information at an earlier time. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 689; *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212; *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1198-1201.) No point raised in defendants' moving papers on reconsideration is "new." (See *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468 [facts of which movant was aware at time of original ruling are not "new or different" within meaning of § 1008]; *Hennigan v. White* (2011) 199 Cal.App.4th 395, 405–406 [motion for reconsideration of summary judgment properly denied where, at the time of the

original ruling, the plaintiff was aware of the information in the new declarations she sought to offer].)

Berbey and Schoonover raise five issues on reconsideration: 1) lack of oral argument; 2) that the case is moot; 3) that the lack of issuance of a remittitur was not fatal to defendants' mootness argument; 4) that defendants would be deposed as cross-complainants as well as defendants; and 5) that the renoticing of defendant's depositions mooted the motion to compel.

No Oral Argument:

A lack of oral argument is not grounds for reconsideration. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500; see also *Garcia v. Hejmadi*, *supra*, 58 Cal.App.4th at p. 691 [lack of a chance for oral argument is clearly "collateral to the merits" and therefore not grounds for reconsideration].)

"Mootness" of the Case is not "New"

Defendants raised the issue of whether the Opinion of the Fourth District Court of Appeal rendered any part of the instant case moot repeatedly in their Opposition to the Motion to Compel. (See Defendants' Opposition to Plaintiff's Motion to Compel at 4:6-10; 6:12 and 6:13-17.) Furthermore, as found in the ruling on the defendants' motions for judgment on the pleadings, the Fourth District Court of Appeals' Opinion did not entirely moot this matter.

The Remittitur Argument is not "New"

The fact that the remittitur had not issued on the Fourth District Opinion by the time of the Motion to Compel is not new, as it occurred before the oral argument on the Motion to Compel. (*In re Marriage of Herr*, *supra*, 174 Cal.App.4th at p. 1468.) The fact that defendants were deprived of oral argument by counsel's neglect is not remediable on reconsideration. (*Gilberd v. AC Transit*, *supra*, 32 Cal.App.4th at p. 1500; see also *Garcia v. Hejmadi*, *supra*, 58 Cal.App.4th at p. 691.)

The Language in the Deposition Notices Regarding the Procedural Posture of the Deponents is not "New"

Defendants claim that plaintiff's intent to depose Berbey and Schoonover as both defendants and cross-complainants is a "new factual issue." The language of deposition subpoenas did not change after the filing of the Motions. This argument was before the court, having been raised in defendants' written Objections to the underlying deposition notices. It is without merit. A party is subject to only one deposition in an action regardless of whether they may occupy several roles as defendant or cross-complainant. (Code Civ. Proc., §2025.610.)

Renoticing the Depositions is not "New"

Defendants discuss the renoticing of the depositions at length in their opposition to the Motion to Compel. (See Defendants' Opposition to Plaintiff's Motion to Compel at 5:9-6:2) It is not new. Moreover, while the renoticing and taking of the depositions would have mooted the motion to compel, defendants also failed advised they would not appear at the second noticed depositions. Under these circumstances, plaintiff was within his rights to leave his existing motion to compel on calendar.

The Court May Not Grant Code of Civil Procedure 473 Relief

This court may not grant relief under section 473, if relief cannot be granted under section 1008. (*Gilberd*, *supra*, 32 Cal.App.4th at pp. 1499-1501.) "To hold, under the circumstances presented in this case, that the general relief mechanism provided in section 473 could be used to circumvent the jurisdictional requirements for reconsideration found in section 1008 would undermine the intent of the Legislature as specifically expressed in section 1008, subdivision (e): 'No application to reconsider any order ... may be considered by any judge or court unless made according to this section.' " (*Id.* at p. 1501.)

Reconsideration of Sanctions Order

The court reconsiders its sanction order on its own motion, as the order of sanctions against counsel was improper. (*Le Francois v. Goel*, *supra*, 35 Cal.4th 1094, 1108.) Code of Civil Procedure section 2025.610, subdivision (g)(1) provides, that If a motion to compel attendance at deposition is granted, "the court shall impose a monetary sanction … in favor of the party who noticed the deposition and *against the deponent* or the party with whom the deponent is affiliated, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." The statute does not provide for the award of sanctions against anyone other than the deponents. Accordingly, the court modifies the prior order to impose sanctions against Berbey and Schoonover only.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 01/22/18
(Judge's initials) (Date)